II. EVEN IF SECTION 1 APPLIES, THE PER SE RULE DOES NOT.

As noted, the District Court found, and the Ninth Circuit agreed, that the creation of the joint ventures "ended competition between Shell and Texaco throughout the nation in the areas of downstream refining and marketing of gasoline." Pet. App. 4a. Respondents do not dispute this finding, except to suggest that competition between Shell and Texaco could have *resumed* at some point if the joint ventures were unwound. That, of course, would be true with respect to *any* joint venture; indeed, it would be true of even a merger, following which the merged entity could be split apart, resulting in competition similar to that which existed before the merger. That does not change the simple fact that, at all times when the decision to charge the same prices for Shell- and Texaco-branded gasoline was effective, those products were not in competition with each other. As a result, *that decision did not restrain competition at all*; far less was the decision one that would have "predictable and pernicious anti-competitive effects" such that it could be per se illegal.

Rather than addressing the economic and common sense logic of this proposition, Respondents assert repeatedly that this Court's decision in *Citizen Publ'g* "is directly on point and controlling." *E.g.*, Brief for Respondents 20. Respondents are wrong for two reasons. First, *Citizen Publ'g* is readily distinguishable. There, the joint venture partners did not fully integrate their operations in the relevant market; instead, they maintained their separate production of news and editorial content and therefore remained in competition with each other. In addition, quite unlike the situation here—where the FTC reviewed the formation of Equilon and Motiva and determined that those joint ventures were not anticompetitive—in *Citizen Publ'g* the district court found that the joint newspaper operating agreement was anticompetitive and violated both Section 2 of the Sherman Act and Section 7 of the Clayton Act. 394 U.S. at 135.

Second, to the extent that *Citizen Publ'g* might nevertheless be read broadly, as Respondents urge (Brief for Respondents 19), for the proposition that pricing or other decisions that are related only to the products of an otherwise procompetitive joint venture may be condemned as per se illegal, the opinion is inconsistent with *Broadcast Music*, *NCAA*, and other subsequent decisions of this Court that have repudiated the initial suspicion of joint ventures that reached its apex with this Court's 1972 decision in *United States v. Topco Associates*, 405 U.S. 596 (1972), just three years after *Citizen Publ'g* was decided. *See Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001) (noting that, notwithstanding *Topco*, "it is [now] commonly understood . . . that per se condemnation is limited to 'naked' market division agreements, that is, to those that are not part of a larger pro-competitive joint venture"); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224-29 (D.C. Cir. 1986) (noting that *Topco*'s per se condemnation of all horizontal restraints, even if they are ancillary to a partnership or joint venture, was overruled by this Court's decisions in *Broadcast Music, National Collegiate Athletic Assn.* and *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985)).[6] Notably, although Shell made precisely this point about *Citizen Publ'g, see* Brief for Petitioner Shell Oil Co. 24 n.11, Respondents do not respond to it in any manner.[7]

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[6] *See also* Brief for AAI 14 ("[*Topco*] may not reflect this Court's approach after [*Broadcast Music*].").

[7] Respondents assert that this Court's decisions in *Timken* and *Maricopa* "involved joint venture price fixing." Brief for Respondents 41. In fact, in both of those cases, the Court determined that there was no real integration of productive assets sufficient to constitute a true joint venture; it was only for that reason that the Court found the challenged restraints to be per se illegal. *Timken*, 341 U.S. at 597-98; *Maricopa*, 457 U.S. at 356.

Respondents' reliance on Professor Areeda's example regarding a joint selling arrangement between Ford and General Motors is similarly misplaced. *See* Brief for Respondents 20-21. As the quotation from Professor Areeda's treatise makes clear, the hypothetical arrangement is one in which Ford and General Motors would continue to compete in the sale of automobiles and would not share in either the risks or rewards of such sales; instead, they would simply eliminate *one* form of competition between their respective, separately owned products—price competition—by selling through a common distribution agent. Here, by contrast, Shell and Texaco merged all of their domestic production and marketing operations, thereby both "pool[ing] their capital and shar[ing] the risks of loss as well as the opportunities for profit," *see Maricopa*, 457 U.S. at 356, and ending all competition between Shell- and Texaco-branded gasoline, without regard to any agreement with respect to the pricing of those products.[8] Moreover, Professor Areeda's point is that the *formation* of the Ford-General Motors joint selling arrangement would itself be an unreasonable restraint; nowhere does he suggest that, if it were otherwise (and Respondents have waived any rule of reason challenge here), joint pricing of the two companies' products could be condemned as per se (or otherwise) illegal under Section 1. *See* Areeda & Hovencamp, *supra*, ¶ 1475, at 304 ("[O]nce antitrust law deems the creation of an organization to be lawful, it would be inconsistent to prevent it from functioning by characterizing its normal operations as per se or otherwise unlawful conspiracies.").

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[8] Professor Areeda acknowledges that even a joint selling arrangement between two automakers with significant market shares like Ford and General Motors would *not* be per se illegal. Brief for Respondents 21 (*quoting* P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues* 37-38 (Federal Judicial Center, June 1981) ("not unlawful *per se*").

Respondents assert that "[t]he restraint . . . was a direct restraint on price" and therefore per se illegal. Brief for Respondents 33. Respondents' suggestion that every "direct restraint on price" is per se illegal "price fixing" is precisely the sort of "overly simplistic and overbroad" literalness that this Court has rejected. *Broadcast Music*, 441 U.S. at 9. Every time the owners of a business set a price for their products, there is a "direct restraint on price," just as, every time two parties enter into a contract, there is a "restraint of trade." This Court long ago held that not every literal "restraint of trade " is unlawful under Section 1, *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); and the Court has expressly stated that, "[w]hen two partners set the price of their goods or services they are literally 'price fixing,' but they are not per se in violation of the Sherman Act." *Broadcast Music*, 441 U.S. at 9. That principle, not *Citizen Publ'g*, is directly on point and controlling here.

Throughout their brief, Respondents focus exclusively on the decision that the joint ventures would charge the same price, in the same geographic area, for the same grade of Shell- and Texaco-branded gasoline. Nowhere do Respondents suggest that the decision by Shell and Texaco to unify the pricing *function* for the two brands—that is, to put the price setting under the control of each venture's management, supervised by its owners—was illegal.[9] Nor could they reasonably do so, given this Court's clear statement in *Broadcast Music* that two partners may set the prices of their goods *without* violating the Sherman Act. Yet Respondents simply ignore altogether Shell's explanation that the actual prices set for the brands—whether those prices be the same or 2 cents different, or the same on Monday and 2

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[9] The uncontroverted evidence supports the obvious point that the ventures could not have operated efficiently without such unification of the pricing function for the jointly owned products that the ventures were producing. J.A. 130-31 (¶¶ 61-62).

cents different on Tuesday—is totally irrelevant to the Section 1 analysis. *See* Brief for Petitioner Shell Oil Co. 26-27. If it were illegal price-fixing for Shell and Texaco jointly to set the *same* price for the two brands, it would be equally illegal price-fixing for them jointly to set *different* prices for the brands—a totally irrational result squarely at odds with *Broadcast Music*.

III. THE ANCILLARY RESTRAINTS DOCTRINE IS IRRELEVANT HERE.

Both Petitioners and the United States demonstrated in their briefs that the ancillary restraints doctrine, which was applied by the Ninth Circuit, has no relevance here because the challenged restraint relates exclusively to the products of the joint ventures, not to any business activities of Shell or Texaco outside those joint ventures. *See* Brief for Petitioner Shell Oil Co. 27-33; Brief for the United States as Amicus Curiae Supporting Petitioners 21-28. Respondents' only response, other than quotation from an article to the effect that the Ninth Circuit correctly applied the ancillary restraints doctrine, Brief for Respondents 40-41, is to assert that *Citizen Publ'g*, *Broadcast Music*, and *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir.), *cert. denied*, 540 U.S. 940 (2003), "involve restrictions on pricing the venture's own products." Brief for Respondents 47-48. Neither *Citizen Publ'g* nor *Broadcast Music* applied the ancillary restraints doctrine; and, of course, *Broadcast Music* itself compels the conclusion that the restraints at issue here are *not* per se illegal. In *Freeman*, the Ninth Circuit emphasized that the joint venture partners remained competitors outside their joint venture and that the challenged agreements were per se illegal because they restrained that competition among them. 322 F.3d at 1149-50. It is, therefore, just another example of the principle that the ancillary restraints doctrine applies only to restraints on competitive activities outside the joint venture.

IV. "QUICK LOOK" ANALYSIS DOES NOT APPLY HERE.

As Respondents note, this Court has stated that a restraint may be held to violate Section 1 under an abbreviated, or "quick look," rule of reason analysis where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Such abbreviated analysis has no application here, however, because, for the reasons explained in Shell's opening brief and above, the challenged restraint—a decision about the pricing of two products of an integrated joint venture—had *no effect* on competition, far less an obvious anticompetitive effect. No justification whatever for the restraint was therefore required. If one were, it would suffice that the joint venture itself was legitimate and procompetitive and that pricing of a production and marketing joint venture's products is essential to the operation of the venture. As discussed above, it is irrelevant whether the prices set are the same, different or sometimes the same and sometimes different.

Respondents mistakenly rely on *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005), in support of application of "quick look" analysis here. In *Polygram*, the D.C. Circuit expressly relied on the facts that the parties to the joint venture had imposed price and advertising restraints on "products that were not part of the joint undertaking" and that the venturers had continued to sell independently and in competition with their joint venture and each other. *Id.* at 38. The partners were not simply setting the prices of the joint venture's goods—which *Broadcast Music* holds is not illegal price-fixing—but instead restricting the prices of goods sold in competition with the joint venture.[10] No remotely similar

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[10] By focusing on the restriction of products *outside* the joint venture, *Polygram* also illustrates the crucial difference between a

restraint is alleged here.

V. RESPONDENTS HAVE DISTORTED THE FACTUAL RECORD.

Respondents distort the factual record in numerous respects. The distortions are immaterial, because none of them, even if correct, would change the fundamental fact that, once the ventures were formed, Shell- and Texaco-branded gasoline did not compete. But Shell responds to them briefly here lest these factual distortions obfuscate the issues.

First, Respondents assert that the pricing decisions caused price increases. There is absolutely no evidence, however, that any increase in the price of refined gasoline was caused by anything other than market forces—that is, supply and demand.[11] For example, there is no evidence that the prices of Shell- or Texaco-branded gasoline increased *relative to the prices of any other brands of gasoline*, such as Chevron, BP, ARCO, Amoco, Unocal, Exxon or Mobil.[12] Moreover, there

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situation in which the ancillary restraints doctrine applies and one, such as here, in which it does not.

[11] Contrary to Respondents' assertion, there is also no evidence that the price of the Texaco brand "[rose] to the level of the Shell brand." Brief for Respondents 11. The evidence is merely that, in those geographic areas where Equilon or Motiva sold both brands, the prices of the same grades of the same brands were the same. Indeed, Respondents stipulated below to the undisputed fact that "[p]rices in each trade area are set based on conditions in that particular trade area." J.A. 79 (¶ 63).

[12] AAI asserts that "Equilon would not have been able to raise the price of Texaco-brand gasoline without losing money to other rivals unless they were engaged in price coordination." Brief for AAI 26. There is, however, no evidence that Equilon raised the price of Texaco-branded gasoline *relative* to the prices of other brands, the only relevant measure. If the price of all brands increased by $0.20, there would be no reason for Texaco to lose market share or money to its rivals.

is no allegation or evidence of collusion or coordination between the joint ventures (or Shell or Texaco) and any other company in the United States gasoline market. Respondents' and their *amici*'s unsupported innuendo about "unexplained price hikes" (Brief for AAI 7) cannot substitute for evidence.

Second, Respondents assert that refining and marketing was previously profitable for Shell and Texaco and that the joint ventures were designed to avoid passing cost savings on to consumers – which cost savings, Respondents suggest, could have been achieved without forming the ventures. Brief for Respondents 5. Even if this were true, it would be relevant only to a rule of reason challenge to the formation of the joint venture. In any event, Respondents' citations for these points provide no support for them, and all of the evidence is to the contrary. Respondents' own evidence clearly shows that pre-venture refining and marketing profits were "insufficient" and "extremely poor." Appellants' Ninth Circuit Excerpts of Record 264, 279. Respondents' own evidence shows that the ventures would make possibly $800 million in cost savings that would not be possible without them, such as reducing duplication or redundancies. *E.g.*, *id.* at 605 ("Q. Okay. And the duplication was a result of the formation of the alliance, right? A. Yeah. Yeah."); *see also* Brief for Respondents 11 ("anticipated cost savings *from their combination*, estimated at $800 million per year" included elimination of redundancies between companies and avoidance of capital expenditures that would have been required but for ventures' formation) (emphasis added). The Ninth Circuit likewise found that "[t]here is a voluminous record documenting the economic justification for creating the joint ventures." Pet. App. 3a. Finally, Respondents' own evidence shows that all cost savings realized by the ventures would ultimately be passed on to consumers. Appellants' Ninth Circuit Excerpts of Record 300.[13]

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[13] Respondents misleadingly questioned one deponent about whether he had directed or been specifically advised that "synergies

Third, Respondents assert that "Shell and Texaco . . . continued to control The Alliance's marketing of products bearing their brands" through the Brand Management Protocols. Brief for Respondents 32; *see also id.* at 2. Again, even if true, this would not change the fact that the brands did not compete once the joint ventures were formed—regardless of who controlled their marketing. But the Brand Management Protocols did not reserve control over anything about gasoline marketing to Shell or Texaco; they were administered solely by the relevant venture, operating through its management as overseen by a subcommittee of the venture's governing board (which was in turn made up of members appointed by Shell and Texaco, as the venture's owners). Contrary to Respondents' unsupported suggestion, there is no evidence that Shell or Texaco could have unilaterally "directed" (Brief for Respondents 32) how gasoline that a venture sold under its brand name would be marketed – let alone evidence that Shell or Texaco actually did so.

The Brand Management Protocols simply provide that, because the Shell and Texaco brand names were used by Shell and Texaco respectively outside of the ventures, neither venture will use either brand name in a way that would degrade or favor "the value, reputation, prestige and goodwill associated with the Texaco Symbols" over the "Shell Symbols" – or vice versa. Appellants' Ninth Circuit Excerpts of Record 167 & ff. *See also id.* at 443 (intent of Brand Management Protocols was to protect "brand images"). The Brand Management Protocols do not discuss price and there is no evidence that the pricing policy was "a direct

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or costs savings" were being passed on to consumers, but the deponent himself explained that "the reason I'm hesitating is that people don't talk about prices changes in terms of synergies. What they talk about is what's the marketplace -." Appellants' Ninth Circuit Excerpts of Record 650-52.

outgrowth" of them. Brief for Respondents 6 n.10. Respondents themselves trumpet the undisputed evidence that there was no pre-formation discussion whatsoever of pricing. Brief for Respondents 6 n.10, 9-10 & n.14; *see also* J.A. 115 (¶ 25) ("The parties did not discuss what price the joint ventures would charge for gasoline upon or after formation.").[14] In any event, regardless of who controlled the marketing of either product (Shell, Texaco, the joint venture's management, or someone else), both Shell and Texaco stood to profit or lose based exclusively on the overall performance of the two products, so that the products were not in competition with each other.

Fourth, Respondents assert that there were "numerous exceptions permitting competitive activities outside The Alliance by Shell and Texaco." Brief for Respondents 32. Again, none of these Shell or Texaco activities outside the joint ventures changes the crucial fact that, after formation of the ventures, Shell and Texaco did not compete in the domestic wholesale marketing of gasoline. *See, e.g.*, Appellants' Ninth Circuit Excerpts of Record 402 (no exceptions to non-compete for domestic gasoline marketing); *see also* Appellees' Ninth Circuit Supplemental Excerpts of Record 107 (Respondents' expert characterized exclusions

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[14] Respondents distort the testimony to the effect that the joint venturers carefully and properly avoided any pre-formation discussion of pricing to insinuate an "inten[tion] to fix prices" of which there is no evidence and that did not exist (*e.g.*, Brief for Respondents 9 & n.14). Likewise, Respondents' suggestion that documents were "destroyed" and would have shown something sinister (Brief for Respondents 10) is wholly unsupported. As the district court found, "Plaintiffs have no evidence that defendants concealed documents." Pet. App. 46a. Rather, as would be expected and the antitrust laws encourage, the parties entered into confidentiality agreements and took other precautions to insulate the work of the negotiating teams from Shell's and Texaco's ongoing operations. J.A. 114-15 (¶¶ 22-25) & ff.

from ventures as "de minimus"). The fact that the venture owners could compete outside the scope of the ventures shows that the agreements between Shell and Texaco were appropriately drawn narrowly to encompass only the activities of the joint ventures themselves.

Fifth, Respondents assert, without citation to anything in the record, that, "when the Alliance ended . . . Shell and Texaco resumed their 'competition' charging the same prices for their branded gasolines." Brief for Respondents 32. Nothing in the record supports this assertion; indeed, there could be nothing in the record, because the joint ventures ended after the summary judgment motions had been submitted. In any event, any post-venture joint conduct of Shell and Texaco would, in a case in which the issue was properly raised, be subject to antitrust scrutiny. The issue in *this* case relates to the pricing of Shell- and Texaco-branded gasoline manufactured, owned and sold by Equilon during the period when Shell and Texaco did not compete in the relevant market.

Finally, Respondents assert, again without citation, that "having identical prices for Shell and Texaco products inside the Alliance facilitated price uniformity for products outside The Alliance, such as aviation fuel . . . ." Brief for Respondents 32-33. Respondents' amici repeat the assertion, citing only the unsupported statement in Respondents' brief. Brief for the Retail Industry Leaders Ass'n 8, 16-17. Even if true, this assertion would be relevant at most to a rule of reason evaluation of the actual effects of the pricing decision. Again, however, there is absolutely no evidence that supports either part of the assertion—either that prices for other products were uniform or that the pricing of gasoline by the joint ventures had, or might even theoretically have had, any effect on those other prices.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

RONALD L. OLSON
Counsel of Record
BRADLEY S. PHILLIPS
STUART N. SENATOR
PAUL J. WATFORD
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Counsel for Petitioner Shell Oil Company

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TEXACO INC.,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER TEXACO INC.

JOE SIMS
GLEN D. NAGER
LOUIS K. FISHER
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

ROBERT A. MITTELSTAEDT
CRAIG E. STEWART
(Counsel of Record)
MARTHA BOERSCH
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
(415) 626-3939

Counsel for Petitioner Texaco Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR PETITIONER TEXACO INC.

In our opening brief (at 11-26), petitioner Texaco demonstrated that the Ninth Circuit erred in treating the pricing of Equilon's gasoline as concerted action subject to Section 1 of the Sherman Act. When a joint venture or its owners set the price of the venture's own output in a market in which the owners no longer compete, that conduct is necessarily single firm conduct, and cannot properly be treated as an ongoing daily conspiracy. Pricing decisions for such jointly produced output do not deprive the economy of independent decisionmakers or increase any market power. Once the venture itself is validly formed (and the Ninth Circuit here did not question the validity of the formation of this joint venture, which indisputably achieved substantial real efficiencies and was extensively reviewed and found valid by federal and state regulators), the venture is entitled to operate its business as would any other entity, without its every production or marketing decision being second-guessed under the antitrust laws as supposedly unreasonable or unnecessary. This Court's decisions recognize as much, and respected commentators agree.

As we further demonstrated in our opening brief (at 26-37), even if Section 1 review is available in these circumstances, *per se* condemnation of the joint venture's operation is plainly improper. *Per se* treatment is reserved for those few agreements that experience has taught are plainly anticompetitive and economically unwarranted because they directly eliminate otherwise existing competition without offsetting economic benefit. Here, Equilon's pricing decisions did not eliminate competition, because they were made with respect to Equilon's own gasoline as to which the venture's valid formation had already ended competition. Subjecting such decisions to *per se* illegality would effectively prohibit the formation of production and marketing ventures such as this one and deprive the economy of beneficial collaborative activities that this Court and others have recognized produce real consumer benefits.

None of the arguments that respondents or their amici advance in their opposing briefs casts any doubt on these points of law. Indeed, recognizing the indefensibility of the Ninth Circuit's ruling, respondents and their amici advance several arguments that abandon the Ninth Circuit's reasoning and ask the Court to affirm on other grounds. The new arguments, however, are no more valid than the old ones.

I. RESPONDENTS ERR IN SUGGESTING THAT THE PRICING OF JOINT VENTURE OUTPUT BY THE VENTURE OR ITS OWNERS IS *PER SE* ILLEGAL.

A. The *Per Se* Rule Does Not Apply To Pricing Of A Jointly Owned Product As To Which Competition Has Validly Been Ended.

Respondents begin their argument in favor of application of the *per se* rule by suggesting (Resp. Br. 18-20) that this Court's decision in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), forecloses any other analysis of the matter. *Citizen Publishing* obviously does not do so.

In *Citizen Publishing*, the newspapers' venture had neither fully combined the operations of its owners nor eliminated competition between them in the relevant market. Rather, the newspapers had retained their separate news and editorial departments and, in setting their advertising and subscription rates, the newspapers were not setting the price for a jointly produced product (but were agreeing on prices for their separate products as to which they remained in competition). In contrast, here, Texaco and Shell fully combined their respective refining and marketing assets in the relevant markets and themselves exited from competition in these markets; in setting the price of Equilon's production, they were thus no longer acting as separate competitors but rather as joint owners of a single entity. Moreover, unlike this case (in which the Ninth Circuit did not question the legitimacy of the integration of Shell's and Texaco's operations), *Citizen Publishing* ruled that the newspapers could not have validly

integrated their operations. 394 U.S. at 134-35. Thus, *Citizen Publishing* is not only not controlling, it has very little application here, since it dealt with the fundamentally distinct situation in which two competitors have fixed the prices of products that they have not, and could not validly have, jointly produced.

There is also a historical, and resulting doctrinal, reason that *Citizen Publishing* is unhelpful to the analysis here. That decision was rendered in an era in which the Court took a very different approach to antitrust issues generally and to the analysis of joint ventures in particular. Of special significance, *Citizen Publishing* was decided before the Court's rulings in cases such as *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) ("*BMI*"), and *NCAA v. Board of Regents*, 468 U.S. 85 (1984), where the Court adopted a much more nuanced approach to restraints associated with joint ventures. In *BMI*, for example, the venture had set the price for the venture's blanket license. But this Court rejected the *per se* rule as inappropriate, even though (unlike here) the venture participants remained competitors in the same market. That result applies *a fortiori* here, where the pricing decision did not fix the price of any products that remained in competition. Yet respondents would have the Court read *Citizen Publishing* without regard to either later cases such as *BMI* or the Court's evolving approach to joint ventures and related antitrust issues.

Respondents complain (Resp. Br. 19, 33) that this case involves a "price-fixing" agreement that "was secret" and that *per se* treatment is required because they challenge a "direct restraint on price." But this complaint rests on the very "overly simplistic" literalism that this Court rejected in *BMI*, 441 U.S. at 9. The question is not whether a price has been jointly set. The question is whether setting the price has restrained competition that would otherwise exist. Here, no such restraint existed because competition between the two companies had already been ended in this market by virtue of Equilon's formation and the complete, efficiency-

enhancing integration of Shell's and Texaco's gasoline businesses in the United States. Respondents do not, and cannot, cite any authority for applying the *per se* rule where the agreement at issue is between the owners of jointly produced products as to which competition has validly been ended. In such circumstances, the rationale for *per se* illegality—*i.e.*, that the restraint at issue is one that "always or almost always tend[s] to restrict competition and decrease output," *BMI*, 441 U.S. at 19-20—is inapplicable.

The linchpin of this Court's cases applying the *per se* rule against price-fixing agreements is the "absence of competition secured by the agreement." *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927); *see id.* ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition."). Here, the decision by Equilon (or its owners) as to the price for Equilon's gasoline did not secure the absence of competition. It was simply the pricing of products that were already jointly owned and thus not in competition. There is no basis for subjecting them to Section 1 scrutiny at all, much less for condemning them as *per se* illegal.

Respondents thus also err in suggesting (Resp. Br. 33-44), that *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982), and *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), support application here of the *per se* rule. In *Maricopa County*, the pricing decisions were held to be *per se* unlawful because the doctors in issue there had *not* validly ended relevant competition by forming a cooperative enterprise in which they "pool[ed] their capital and share[d] the risks of loss as well as the opportunities for profit." 457 U.S. at 356. Had they done so, as Shell and Texaco did here, the Court recognized that a decision among them setting the price for their joint product "would be perfectly proper." *Id.* at 357. And, like the doctors in *Maricopa County*, the corporations in *Timken* had not integrated their operations into a new venture, but had simply reached horizontal agreements regarding the prices of their separately produced

and competing products. Respondents thus do not and cannot gain support from either decision.

Respondents' reliance on *BMI* is similarly misplaced. The fact that the copyright holders there continued to sell individual licenses was relevant because, absent the availability of such individual licenses, the challenged blanket licenses would have been the exclusive means of purchasing virtually any copyrighted work. *See BMI*, 441 U.S. at 5 ("[a]lmost every domestic copyrighted composition is in the repertory" of the defendants). Equilon enjoyed no such control over domestic gasoline, but faced numerous, significant competitors. That was the reason, in combination with the efficiencies that Equilon's formation would create, that the FTC permitted Equilon to be formed to produce and market gasoline. And, once validly formed, Equilon and its owners were entitled to set a price for its products on the same basis that BMI and ASCAP were allowed to set the price for their joint products. Indeed, whereas rule of reason analysis was appropriate in *BMI*, because the copyright holders remained in competition in the market, here Section 1 scrutiny is not appropriate at all, because Shell and Texaco no longer compete in the relevant market.

Respondents emphasize (Resp. Br. 35-36) that the blanket licenses in *BMI* were a "new product" that individual copyright holders could not have produced on their own. But procompetitive, efficiency-creating ventures are not limited to those that create new products. As in this case, joint ventures can create efficiencies in producing and marketing existing products by eliminating redundancies, creating economies of scale, and sharing risk. *See* Tex. Br. 25 n.13. Even the Ninth Circuit recognized that "[t]here is a voluminous record documenting the economic justifications for creating the joint ventures" here. Pet. App. 4a. That being the case, no basis exists for Section 1 scrutiny of—much less for condemning as *per se* illegal—the operation of Equilon's validly formed business. As *BMI* itself stated, "[w]hen two partners set the price of their goods or services

they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act." 441 U.S. at 9.

B. Respondents Err in Suggesting That "Ancillary Restraint" Jurisprudence Requires Joint Venturers To Prove The "Necessity" Of Pricing Decisions About Their Jointly Owned Products.

Finding no support for their argument in this Court's *per se* rule jurisprudence, respondents next erroneously seek refuge in the so-called "ancillary restraint" jurisprudence. Specifically, respondents argue (Resp. Br. 38-41) that, under "ancillary restraint" cases, *per se* treatment is proper unless defendants can prove that charging the same price for the Shell and Texaco brands was "necessary" to the venture's success. As demonstrated in our opening brief (at 32-37), however, that argument is fundamentally flawed.

Among other things, respondents proceed from the mistaken premise that setting a price for Equilon's gasoline is an "ancillary" restraint that must be separately justified. As the United States explains (U.S. Br. 22-28), "ancillary restraint" analysis only applies to agreements that themselves restrain competition outside of the joint venture, and that therefore must themselves be separately justified. *See Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210, 224 (D.C. Cir. 1986) (describing an ancillary restraint as "an agreement eliminating competition"). When the alleged agreement does not impose any additional limitation on competition that would exist absent that agreement, no basis exists for requiring separate justification. Rather, it is the agreement that eliminated competition in the first place that is subject to antitrust scrutiny and that must be justified. In this case, that agreement was Equilon's formation as both a production and a marketing venture. The decision as to how that venture's products would be priced is simply the operation of that venture; it is not an additional restraint that can be said to restrain competition in the market and to require scrutiny as an "ancillary restraint."

Contrary to respondents' assertion, this is exactly the approach followed in *BMI*. The Court there did not analyze the pricing of the blanket license as an ancillary restraint. The setting of a price for the license did not create any additional elimination of competition separate from the creation of the blanket license itself. The setting of price was simply the "necessary consequence" of creating the blanket license, 441 U.S. at 21—just as the necessary consequence of forming a venture to both produce and sell gasoline is that a price must be established for that gasoline.

There is an important difference between *BMI* and this case—but it is a difference that further defeats respondents' argument. In *BMI*, the venture members each continued to produce and own their own copyrighted works and "retain[ed] the rights individually to license" those works. 441 U.S. at 11. In contrast, here, Shell and Texaco entirely exited the relevant market and were no longer in competition with each other or with Equilon; and the challenged action—the joint setting of a unified price for the joint venture's gasoline production—concerns the operations of the joint venture itself, not "ancillary" actions of the joint venture partners. Thus, whereas rule of reason analysis remained to be applied to the restraint at issue in *BMI*, here no Section 1 scrutiny is appropriate at all, much less *per se* analysis.

Applying ancillary restraint analysis to a venture's operation of its own business would work a fundamental shift in antitrust jurisprudence. When two companies form a venture that integrates some aspect of their operations, the courts do not condemn that integration as *per se* illegal if the companies cannot show that the integration was "necessary" or that the companies could not function without it. Instead, the courts evaluate the integration under the rule of reason, with the burden on the plaintiff to initially prove that the integration will have anticompetitive effects. It is only if such anticompetitive effects are shown that the courts inquire into whether the benefits of the venture outweigh those effects and whether particular aspects of the venture are